

BEFORE THE POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON

DANIEL B. O'CONNELL,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT  
OF ECOLOGY,

Respondent.

PCHB No. 89-124

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND ORDER

This matter, the appeal of \$150 in civil penalties, for alleged violation of regulations implementing the water well construction law came on for hearing in Wenatchee, Washington, on March 9, 1990, before Wick Dufford, Presiding for the Board. Judith A. Bendor, Chair, and Harold S. Zimmerman, have reviewed the record.

Daniel B. O'Connell represented himself. The Department of Ecology was represented by P. Thomas McDonald, Assistant Attorney General. The proceedings were reported by Cindy J. Chatterton of Affiliated Court Reporters.

1 Witnesses were sworn and testified. Exhibits were admitted and  
2 examined. From the testimony heard and exhibits examined, the Board  
3 enters the following:

4 FINDINGS OF FACT

5 I

6 Daniel B. O'Connell is a licensed well driller, qualified  
7 pursuant to the state's examination system. He is an employee of MVM  
8 Quality Drilling, located in Bridgeport, Washington.

9 II

10 The Department of Ecology is a state agency which administers the  
11 allocation of groundwater resources and conducts a program regulating  
12 the construction of water wells.

13 III

14 Under RCW 90.44.030, a permit is required for the appropriation  
15 of groundwater with the exception of relatively small developments  
16 usually involving domestic wells. For groundwater developments  
17 subject to permit, the well construction regulations require that a  
18 permit be received before the well is drilled. WAC 173-160-040.

19 IV

20 On September 21, 1988, O'Connell submitted to Ecology a well log  
21 for an irrigation well constructed in August 1988 on property near the  
22 Conconully Highway in Okanogan County. On March 20, 1989, O'Connell  
23 submitted two well logs for two wells completed in early 1989 for WN  
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26  
27 FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER  
PCHB No. 89-124

1 Orchards of Pateros, Washington. The proposed use of one of these was  
2 noted as irrigation; the proposed use of the other was not identified.

3 V

4 On checking their files, Ecology personnel could find no record  
5 of an appropriation permit for any of the three wells identified in  
6 the well logs submitted by O'Connell. No such permit had in fact been  
7 obtained prior to the drilling of the three wells in question.

8 VI

9 On May 5, 1989, Ecology sent separate Notices of Civil Penalty  
10 for constructing the wells "without benefit of a permit," to both MVM  
11 Quality Drilling and to O'Connell. The Notice directed to O'Connell  
12 assessed a penalty of \$50 per well for a total of \$150.

13 MVM did not appeal the penalty assessed against it. However,  
14 O'Connell brought this appeal of the separate penalty assessed against  
15 him personally, after Ecology declined to grant his request for  
16 mitigation.

17 VII

18 The groundwater permit program involves Ecology in often  
19 difficult judgments about the availability of water in particular  
20 locales, the extent of existing demands on the resource and the status  
21 of prior rights. Conclusions reached on these matters frequently  
22 leads to the conditioning of permits, as to precise location, depth or  
23 zone to be tapped, casing requirements to protect certain aquifers,  
24 and other requirements specific to individual wells.

25  
26 FINAL FINDINGS OF FACT,  
27 CONCLUSIONS OF LAW AND ORDER

PCHB No. 89-124

(3)

The requirement that a permit be issued before a well is drilled is to allow for compliance with such conditions in the well construction process.

## VIII

With the increased usage of groundwater in recent years, the program for regulating well constuction has grown more thorough and more detailed. Presently, the system calls for a "start card" to be filed with the agency at least three days before the start of drilling, stating the location of the job and its duration. The purpose is to give Ecology personnel a chance to check the file in advance to see if required permits have been issued. If a needed permit has not been issued, Ecology contacts the contractor and attempts to prevent a problem from arising.

In none of the cases at hand was a "start card" received by Ecology. In each case, the agency became aware of the well construction after the fact through the submission of well logs.

## IX

The construction of a water well frequently involves at least three parties: the appropriator, the water well contractor and the driller or operator.

The permit is, generally, applied for and obtained by the person wishing to appropriate the water, usually the landowner.

Commonly, the appropriator contracts with a contractor to

1 construct the well. In the ordinary case the contractor will own the  
2 drilling equipment to be used.

3 After the contract is made, the contractor normally assigns a  
4 driller in his employ to go to the site and do the actual construction  
5 work.

6 X

7 The common practice in the industry is for the contractor to  
8 handle negotiations with the appropriator and to do the preliminary  
9 paper work. The contractor is in a position to find out if a permit  
10 has been issued. The contractor schedules the work to be done and  
11 sends in the "start cards."

12 The driller is assigned to a job by the contractor, told what  
13 equipment to use, and sent out with a description of the location and  
14 the physical particulars about the well to be drilled. Most often,  
15 the driller will not know whether a permit has been issued or, even,  
16 whether "start cards" have been submitted.

17 XI

18 In the present case, O'Connell, the driller, had no advance  
19 information on the permit status of any of the projects, nor did he  
20 know that "start cards" had not been sent.

21 He supervised the construction of the three wells on site and  
22 noted and recorded the geologic details encountered in drilling, as  
23 well as the size, depth and other features of the wells when built.

24 This information, derived from experience on site, was  
25

1 subsequently transferred by O'Connell to a well log for each well.  
2 The balance of each log form, including the landowner's name and the  
3 legal description of the well location, was filled in by MVM Quality  
4 Drilling.

5 XI

6 At the hearing, Ecology expressed no dissatisfaction with the  
7 construction work on the three wells. The sole basis for the civil  
8 penalty assessed was the lack of an appropriation permit in each case.

9 The well not identified as to proposed use on its well log was  
10 later the subject of an application for domestic use. Ecology did not  
11 show that this well involved an appropriation exceeding 5,000 gallons  
12 a day.

13 XII

14 Any Conclusion of Law which is deemed a Finding of Fact is hereby  
15 adopted as such.

16 From these Findings of Fact, the Board reaches the following:

17 CONCLUSIONS OF LAW

18 I

19 The Board has jurisdiction over these parties and the subject  
20 matter. Chapters 90.44, 18.104 and 43.21B RCW.

21 II

22 RCW 90.44.050 states:

23 After June 6, 1945, no withdrawal of public ground  
24 waters of the state shall be begun, nor shall any well

25  
26 FINAL FINDINGS OF FACT,  
27 CONCLUSIONS OF LAW AND ORDER  
PCHB No. 89-124

or other works for such withdrawal be constructed, unless an application to appropriate such waters has been made to the department and a permit has been granted by it as herein provided. . . . (emphasis added.)

The language from the Groundwater Code is followed by a proviso which creates an exception to the permit requirement for withdrawals

for stock-watering purposes, or for the watering of a lawn or of a noncommercial garden not exceeding one-half acre in area, or for single or group domestic uses in an amount not exceeding five thousand gallons a day, or for an industrial purpose in an amount not exceeding five thousand gallons a day. . . .

## III

Chapter 18.104 RCW governs the regulation of water well construction. The statute establishes an examination and licensing requirement for well construction operators. RCW 18.104.070.

It also empowers Ecology to adopt rules governing how wells are made. RCW 18.104.040(4). Such rules are contained in Chapter 173-160 WAC, which includes a section stating that no well requiring an appropriation permit shall be constructed unless a permit has been granted. WAC 173-160-040.

The effect of this rule is to make the Groundwater Code's stricture against well construction prior to permit subject to the sanctions provided by chapter 18.104 RCW.

## IV

RCW 18.104.155 authorizes civil penalties "of up to one hundred

1 dollars per day per violation of this chapter or rules or orders of  
2 the department adopted or issued pursuant to it."

3 The Notice of Penalty (No. DE 89-C168) sent to O'Connell asserts  
4 the violation of a rule, WAC 173-160-040. From statutory context, it  
5 appears that civil penalties can be levied against both contractors  
6 and operators.

7 v

8 The question, then, is whether the particular rule cited, WAC  
9 173-160-040, applies to operators as well as to contractors. The  
10 terms are defined. RCW 18.104.020(5) and (7) and WAC 173-160-030(31)  
11 and (48). The term "driller" is used synonymously with "operator."  
12 WAC 173-160-030(49).

13 The focus of the definitions is that an "operator" is a  
14 contractor's employee who supervises actual well construction on site,  
15 whereas a "contractor" is the entity which conducts the business.  
16 Both the statute and the regulations explicitly impose certain record  
17 keeping and reporting requirements on contractors. RCW 18.104.048,  
18 WAC 173-160-055 (start cards); RCW 18.104.050, WAC 173-160-050 (well  
19 logs).

20 No such obligations for paper work are explicitly imposed on  
21 drillers. On the other hand, drillers are clearly intended to be held  
22 responsible (along with the contractors) for violations of the  
23 detailed and elaborate rules for the physical construction work.

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26 FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

27 PCHB No. 89-124



VI

We believe that the statute and its implementing rules were written in light of an understanding of the common practice in the industry. After considering, the overall scheme of the water well construction statute and the relevant rules, we interpret the provisions of WAC 173-160-040 as enforceable against contractors, but not against drillers.<sup>1/</sup>

In short, the responsibility for seeing that no well requiring a permit is constructed until that permit is granted falls on those in a position to know whether the requirement has been fulfilled and able to insist on its fulfillment as a contract condition. Successful implementation is a matter of office work, not field work.

VII

Our decision on this matter is based on our view of the law. We also note that the equities of the situation point in the same direction. The only way drillers can protect themselves against violating WAC 173-160-040 is by refusing to go out on any job until shown a permit. Realistically, this is asking employees to risk their livelihood for something clearly within the responsibility of their employers. It is rather like making drillers responsible for the failure to file "start cards."

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<sup>1/</sup> We recognize that in some small outfits, contractor and operator may mean the same person. In such cases that person is subject to all rules applicable to either contractors or drillers.

IX

Any Finding of Fact which is deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions of Law, the following is entered:

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

PCHB No. 89-124

(10)

ORDER

The Notice of Penalty Incurred and Due (No. DE 89-C168) issued to Daniel B. O'Connell is reversed and the penalty assessed thereby is VACATED.

DONE this 20<sup>th</sup> day of March, 1990.

POLLUTION CONTROL HEARINGS BOARD

Wick Dufford

WICK DUFFORD, Presiding

Judith A. Bendor

JUDITH A. BENDOR, Chair

Harold S. Zimmerman

HAROLD S. ZIMMERMAN, Member